Supreme Court, U.S.
FILED
08-628 SEP 9 - 2008
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No. ____

In The

Supreme Court of the United States

MARINE FORESTS SOCIETY and
RODOLPHE STREICHENBERGER,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Superior Court of California
County of Sacramento

Date & Time: 1/31/2006
Judge: LOREN E. MCMASTER
Reporter: None

Dept. No.: 53
Clerk: C. GREENWOOD
Bailiff: A. PERSSONS

Case No. 00AS00567 Present:

MARINE FORESTS SOCIETY ET AL

VS.

CA COASTAL COMMISSION ET AL

Nature of
Proceedings: Motion For Award of Attorney's Fees

Court's Ruling on Matter Taken Under Submission on 11/30/2005.

TENTATIVE RULING:

Plaintiffs' motion for attorney fees is denied.

Plaintiff seeks fees pursuant to CCP 1021.5. In making its motion plaintiff fails to address the fact that the Court of Appeal, Third Appellate District has already determined that plaintiffs are not entitled to private attorney general attorney fees because it failed to meet its burden of showing that the financial burden of bringing the litigation was out of proportion to its individual stake.

The Supreme Court denied plaintiff's petition for review. This decision is now final.

In opposition defendant contends that plaintiff is not entitled to 1021.5 attorney fees because the appellate decision is law of the case and binding on this Court. The Court agrees.

As stated by the Court of Appeal, Third Appellate District, in its unpublished decision on the attorney fee issue, Marine Forests' primary objective in bringing this litigation was to prevent the Commission from ordering it to remove its artificial reef or to pay monetary penalties for its failure to do so. The inability of Marine Forests to obtain the necessary permits to construct its artificial reefs and the impending removal of its artificial reef threatened its very existence. According to the court of appeal, Marine Forests raised every conceivable theory, including the separation of powers argument, to prevent this from occurring. It also sought damages for violation of its civil rights. Under these circumstances the court found that an award of public interest attorney fees was not needed to encourage Marine Forests to raise the separation of powers issue. Marine Forests presented no evidence in the trial court to support the necessary finding that the litigation transcended its financial interest in the outcome and imposed a financial burden disproportionate to its individual stake in the matter even after the Commission raised the issue and pointed out the deficiency in the evidence.

The Court of Appeal reversed the trial court order and remanded the matter with directions to enter an order denying Marine Forests' motion for attorney fees. That order has subsequently been entered and it is now final. This court is obligated to follow the order of the Court of Appeal.

Plaintiff's contentions that new facts and law permit it to bring a new motion for attorney fees following appeal and Supreme Court review are both unconvincing and fail to supply a basis for this court to award attorneys fees in the face of the Court of Appeal's determination and order. The attempts to reopen the record are unavailing. This court does not disagree with plaintiff's assertion that it's [sic] bring[ing] of the lawsuit was the catalyst that resulted in the Legislature's amendment of the statutes at issue. However, that does not supply a basis for this court to ignore the law of the case in the form of the appellate court's determination of the attorney fee issue. Further, even assuming that plaintiff is the successful party for purposes of the statute, this Court has no authority to reconsider the appellate court decision, and enter a different order. That can only be done by the Court of Appeal.

Defendant is directed to prepare a formal order for the court's signature.

COURT RULING:

The matter was argued and submitted. The matter was taken under submission.

RULING ON SUBMITTED MATTER:

Having taken the matter under submission, the Court now rules as follows:

The Court vacates its tentative ruling in its entirety and now rules as follows

Marine Forests' motion for attorney fees is granted in part and denied in part.

Insofar as the motion pertains to the fees for the trial court proceedings prior to the appeal, it is denied. Marine Forests seeks fees pursuant to CCP 1021.5. Where a prior appellate opinion expressly ruled on party's entitlement to attorney[s'] fee[s], the trial court is bound by principles of "law of the case" to follow the appellate court's expressions on the subject. See *Benson v. Greitzer* (1990) 220 Cal.App.3d 11, 14.

Here, the Court of Appeal, Third Appellate District has already determined that plaintiff is not entitled to private attorney general fees for the trial court element of this action. The Supreme Court denied plaintiff's petition for review of the attorney fee issue. The appellate decision is now final. In the circumstances, the Court is forced to conclude that the appellate decision is law of the case in respect to the trial court fees.

The Court is not persuaded that Judge Kobayashi's award is properly characterized as an "interim" fee award that somehow negates the doctrine of law of the case. In reversing the trial court's fee award,

the Third District Court of Appeal indicated that the additional causes of action in the underlying complaint had been rendered moot by its order that the Commission lacked the authority to issue a cease and desist order. It also refused to address the question of whether the award was premature. In any event, Code of Civil Procedure section 1021.5 attorney fees are awardable to the successful party. It is highly unlikely that an interim award would even be proper.

Marine Forests' reliance on *Bell v. Farmer's Insurance* (2001) 87 Cal.App.4th 805 is misplaced. The reference to the possibility of interim fees awards under 1021.5 is pure dicta. In any event, the *Bell* court pointed out that there was no decisional law in California supporting such an award. The fee award was sought, and granted, at the conclusion of the trial court action. It was not an "interim" award.

The law of the case doctrine applies to any ruling in an appellate court opinion that was necessary to its decision. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212.) Here, the issue of fees to defend the trial court's decision at the appellate level was not before the Third District Court of Appeal. Such fees had not yet been incurred. Thus, the law of the case doctrine does not technically apply to this court's consideration of the fees incurred in the appellate court. This is not to say, however, that this Court may decide this matter without reference to the appellate court's reasoning.

In its unpublished decision, the Court of Appeal, Third Appellate District applied well-established law to the facts of this case. The court pointed out that Marine Forests had the burden to prove that it met the relevant criteria for an award of 1021.5 fees. The court agreed with the Commission's argument that Marine Forests had not demonstrated that the necessity and financial burden of private enforcement outweighed its personal stake in the litigation. The court's decision was based on the state of the record in the trial court. The appellate court emphasized that even after the Commission raised the issue in the trial court, Marine Forests failed [to] address the manner in which the financial burden of pursuing the litigation outweighed its personal stake in maintaining its artificial reef and avoiding penalties. The court determined Marine Forests' primary objective in bringing this litigation was to prevent the Commission from ordering it to remove its artificial reef or to pay monetary penalties for its failure to do so. The inability of Marine Forests to obtain the necessary permits to construct its artificial reefs and the impending removal of its artificial reef threatened its very existence.

According to the Court of Appeal, Marine Forests raised every conceivable theory, including the separation of powers argument, to prevent this from occurring. It also sought damages for violation of its civil rights. The Court of Appeal found that Marine Forests presented no cognizable evidence to support a finding that the litigation transcended its financial

interest in the outcome and imposed a financial burden disproportionate to its individual state [sic] in the matter. Under these circumstances the Court found that an award of public interest attorney fees was not needed to encourage Marine Forests to raise the separation of powers issue. The Court of Appeal's decision was premised, in part, on the fact that the cease and desist order had been vacated by its decision. This is no longer the case.

The Supreme Court has determined the Coastal Commission passes constitutional muster following the legislative changes. The Court held that even assuming the trial court and the appellate court were correct in determining that the prior version of the Coastal Act provisions governing the composition and tenure of the members of the Coastal Commission violated the separation of powers clause of the California Constitution, past actions of the Commission could not be challenged on that ground. Thus, the Supreme Court declined to invalidate the Coastal Commission's prior orders, including those that applied to Marine Forests. The trial court injunction was vacated. Marine Forests is again subject to the cease and desist order. Marine Forests has, in fact, obtained no pecuniary benefit.

As noted above, this case is now in an entirely different posture following the Supreme Court's decision. The case is now final and Marine Forests has brought a motion alleging new facts and circumstances for fees that were not previously adjudicated.

Faced with a different record, this Court believes that it has both the duty and the discretion to consider the new facts in light of existing law. The test for an award of attorney fees under section 1021.5 is unchanged.

"Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or non pecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." CCP section 1021.5.

The Court is persuaded that the statutory change to the Coastal Commission triggered by this lawsuit resulted in the enforcement of an important constitutional right that conferred a significant benefit [to] the public at large. A significant goal of the litigation was to ensure that the composition of the Coastal Commission complied with the Separation of Powers Doctrine. Marine Forests achieved that litigation goal. It is the prevailing party for purposes of a 1021.5 fee award. It is clear that the lawsuit by Marine Forests was the catalyst in bringing about the change in the law regarding the Coastal Commission

so that the separation of powers doctrine was no longer implicated.

Applying the analysis of the Court of Appeal, the question before this court at this time is whether Marine Forests has met its burden of proving that the litigation was necessary and imposed a financial burden on the plaintiff that was out of proportion to the plaintiff's individual stake in the matter.

The financial burden of private enforcement criterion is met "when the costs of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on plaintiff out of proportion to his individual stake in the matter." *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89 (Citations omitted.) An assessment of this criterion involves a realistic and practical comparison of the litigant's personal interest with the costs of the suit.

Here, Marine Forests claims that the costs of the suit overall are in the realms of $265,000 and for the court of appeal $128,283 in fees. The Court notes that out of pocket expenses are not recoverable as fees and the appellate court directed each party to pay its own costs. The entire appellate action concerned the trial court's decision on the separation of powers, no other claim was before the court of appeal.

Based on the previous record, the appellate court identified Marine Forests' primary objective as "preventing the Commission from ordering it to remove its artificial reef or to pay monetary penalties for

failure to do so." Marine Forests presented no evidence in the trial court to support the necessary finding that the litigation transcended its financial interest and imposed a financial burden disproportionate to its individual stake.

Marine Forests has now produced the declaration of Rodolphe Streichenb[e]rger that the reef was formed by volunteers out of inexpensive recycled materials. It would cost no more than $26,300 for the reef to be professionally removed. There is no evidence that plaintiff has refused to remove the reef, thus there is no evidence that defendant will necessarily be subject to penalties in any amount. There is also no evidence that Marine Forests will cease to exist if it is forced to remove the reef.

On this record such a stake cannot be viewed as other than grossly disproportionate to the litigation costs incurred in protecting the trial court's determination that the separation of powers doctrine was adversely implicated. See *City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287.

The motion for attorney fees for the appellate court portion of this action is granted. The Court finds the hourly rates requested by plaintiff to be reasonable. However, the Court cannot readily determine which hours were applicable to the proceedings in the appellate court and which hours applied to the trial court proceedings and public relations activities (speeches, articles and the like). The Court is of the view that only that time directly involved in

litigating the matter in the appellate court is recoverable, as well as time reasonably spent in the preparation of the fee petition. Therefore the Court orders Marine Forests to submit a revised schedule showing fees claimed since the matter became pending in the Court of Appeal. All charges for pre-appeal trial activity and all charges for speeches and preparation of articles are to be deleted. The revised statement of hours shall be filed and served no later than February 8, 2006. The Attorney General may file any objections to the hours claimed no later than February 17, 2006. Upon receipt of both parties' supplemental papers the Court will again take the matter under submission and issue a final ruling on the amount of attorneys fees awarded to Marine Forests.

Certificate of Service by Mailing
(C.C.P. Sec. 1013a(4))

I hereby certify that I am not a party to the within action and on this date I mailed a copy of this minute order to each party or attorney listed herein in a sealed envelope with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Dated: 1/31/2006 By: C. GREENWOOD
Deputy Clerk

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160 Cal.App.4th 867

Court of Appeal, Third District, California.
MARINE FORESTS SOCIETY et al.,
Plaintiffs and Appellants,
v.
CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant.
No. C052872.

March 4, 2008.
Review Denied June 11, 2008.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Tom Greene, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, and Lisa Trankley, Deputy Attorney General, for Defendant and Appellant.

The Zumbrun Law Firm, Ronald A. Zumbrun and Mark A. Teh, Sacramento, for Plaintiffs and Appellants.

SCOTLAND, P.J.

At issue in this appeal is whether Marine Forests Society (Marine Forests) qualifies for an award of attorney fees pursuant to Code of Civil Procedure section 1021.5 (hereafter section 1021.5), which entitles a "successful" litigant to such an award when its lawsuit "resulted in the enforcement of an important right affecting the public" and, among other things, "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons." Even without a favorable judicial resolution, the plaintiff is considered a "successful"

litigant for purposes of section 1021.5 if the lawsuit was the "catalyst" that caused "the defendant [to] change[ ] its behavior substantially because of, and in the manner sought by, the litigation." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 560, 21 Cal.Rptr.3d 331, 101 P.3d 140 (hereafter *Graham*).)

But for this lawsuit filed by Marine Forests, the California Coastal Commission (Commission) would be operating as it had since its creation. The authority of the Senate Committee on Rules and the Speaker of the Assembly to not only appoint a majority of the Commission's voting members but also to replace them at will if they act in a manner disfavored by the appointing authority allowed the Legislature to both declare the law and control the Commission's execution of the law and exercise of its quasi-judicial functions. That contravened the separation of powers clause of California's Constitution.

Because of this lawsuit, the Legislature amended the governing statutes to cure the constitutional defect by providing that each of the Commission members appointed by the Senate Committee on Rules or the Speaker of the Assembly shall serve a four-year term and cannot be removed at the pleasure of the appointing authority. This action conferred a benefit on the general public by eliminating the potential that a decision of the Commission affecting an important public right might be influenced by an appointment and removal process that was subject to making members of the Commission subservient to members of the Legislature.

However, while it was the impetus for change in the authority to appoint and remove members of the Commission, the lawsuit did not achieve its objective to enjoin the Commission from requiring Marine Forests to remove an experimental man-made reef that it had planted on the ocean floor. Indeed, the Commission resisted Marine Forests' attack on its action, and the judgment enjoining the Commission from ordering Marine Forests to cease and desist from maintaining the reef was reversed by the California Supreme Court, which held that "under the 'de facto officer' doctrine[,] prior actions of the Commission [such as the cease and desist order in this case] cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge." (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 54, 30 Cal.Rptr.3d 30, 113 P.3d 1062.)

Consequently, even though it was the catalyst that caused *the Legislature* to change the appointment authority, the lawsuit did not cause "the defendant [*the Commission*]" to substantially change *its behavior* "because of, and in the manner sought by, the litigation." (*Graham, supra,* 34 Cal.4th at p. 560, 21 Cal.Rptr.3d 331, 101 P.3d 140.) Thus, despite the fact that this lawsuit was the catalyst for a change in the law, the catalyst theory for a section 1021.5 attorney award does not apply because it was the Legislature, not the Commission, that changed its behavior as a result of this lawsuit.

To the extent it can be said that the rationale of the catalyst theory should apply to a lawsuit like this, which was the moving force resulting in a change in statutory law that conferred a significant benefit on the general public regarding important rights affecting the public, the argument must be made to the California Supreme Court because we are bound by the ruling in *Graham, supra,* 34 Cal.4th at p. 560, 21 Cal.Rptr.3d 331, 101 P.3d 140. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

BACKGROUND

This is the third appeal stemming from litigation between Marine Forests and the Commission.

Because of the separation of powers problem summarized above, we initially affirmed the trial court's judgment that enjoined the Commission from granting, denying, or conditioning permits, or from issuing cease and desist orders. (*Marine Forests Society v. California Coastal Com.* (2002) 104 Cal.App.4th 1232, 128 Cal.Rptr.2d 869 (hereafter *Marine Forests I*), review granted Apr. 9, 2003, S113466.)

We then reversed the trial court's award of trial attorney fees to Marine Forests based on a private attorney general theory. We did so because Marine Forests failed to demonstrate that the financial burden of bringing the litigation was out of proportion to its individual stake in the matter-which is one of the three criteria necessary for the entitlement to

attorney fees pursuant to section 1021.5. (*Marine Forests Society v. California Coastal Commission* (Apr. 1, 2003, C040739), 2003 WL 1711292 [nonpub. opn.] (hereafter *Marine Forests II*).)

In this third appeal, the Commission challenges the trial court's order awarding Marine Forests its appellate attorney fees. Marine Forests cross appeals, contending the trial court erred in ruling that law of the case precluded an award of trial fees and abused its discretion when it failed to apply a larger multiplier in awarding appellate attorney fees. As we will explain, Marine Forests is not entitled to attorney fees because it is not the prevailing party in that the California Supreme Court reversed the judgment in favor of Marine Forests (*Marine Forests Society v. California Coastal Com., supra,* 36 Cal.4th 1, 30 Cal.Rptr.3d 30, 113 P.3d 1062) and it is not a "successful" party under the "catalyst theory" for attorney fees pursuant to section 1021.5. Thus, we shall reverse the order awarding appellate attorney fees. Because Marine Forests was not entitled to attorney fees, its cross appeal fails.

FACTS

The Commission is the "state coastal zone planning and management agency" with primary responsibility for implementing the provisions of the California Coastal Act of 1976. (Pub. Resources Code, §§ 30300, 30330.) It has 12 voting members, with the Governor, the Speaker of the Assembly and the

Senate Committee on Rules each selecting 4 members. (Pub. Resources Code, §§ 30301, subds. (d), (e), 30301.5.)

Marine Forests is a nonprofit corporation whose purpose is the development of experimental research programs for the creation of marine forests to replace lost marine habitat. To promote this objective, it planted an experimental marine forest on a sandy plain near Newport Harbor in Orange County, California. The marine forest was made of various materials, including used tires, plastic jugs, and concrete blocks.

When the Commission commenced cease and desist proceedings regarding the experimental reef, Marine Forests filed a lawsuit. Among other things, Marine Forests claimed that because members of the Commission served two-year terms at the pleasure of their appointing authority (former Pub. Resources Code, § 30312), the Commission should be enjoined from issuing cease and desist orders or from granting or denying permits for coastal development because the scheme for appointment of its voting members gave the legislative branch control over the Commission, thereby impermissibly interfering with the Commission's executive branch responsibility to execute the laws. The trial court ruled in favor of Marine Forests but stayed its decision pending the Commission's appeal.

In *Marine Forests I,* we concluded that the Commission's interpretation and implementation of the

California Coastal Act is an executive function and that the appointment structure giving the Senate Committee on Rules and the Speaker of the Assembly the power to appoint the majority of the Commission's voting members and to remove them at will contravened the separation of powers clause of California's Constitution. This was so because that power allowed the legislative branch to not only declare the law, but also to control the Commission's execution of the law and exercise of its quasi-judicial powers. Accordingly, we affirmed the trial court's judgment in favor of Marine Forests. (*Marine Forests I, supra,* 104 Cal.App.4th 1232, 128 Cal.Rptr.2d 869, review granted Apr. 9, 2003.)

The Commission then appealed from the trial court's order awarding section 1021.5 attorney fees to Marine Forests. The Commission argued that Marine Forests failed to establish a necessary criterion for such an award, namely that the financial burden of litigation was outweighed by its personal stake in the matter. According to the Commission, Marine Forests had a strong personal and pecuniary motive to pursue the requested relief because its primary objective was to prevent the Commission from ordering it to remove its artificial reef, which would have been very costly, or to pay penalties of up to $6,000 a day if it failed to remove the artificial reef. (Pub. Resources Code, § 30821.6, subd. (a).) This purpose was shown by the fact that, aside from its separation of powers contention, Marine Forests alleged other causes of action, including a claim that the Coastal Act precluded the

Commission staff from acting on substantive coastal issues, the cease and desist order would constitute an unconstitutional taking of private property, the Commission's failure to prepare an Environmental Impact Report violated the California Environmental Quality Act (CEQA), and the issuance of a cease and desist order would violate Marine Forests' civil rights.

In *Marine Forests II,* we reversed the attorney fee award for the following reason: "The construction and maintenance of artificial reefs is Marine Forests's main reason for being. Its inability to obtain necessary permits from the Commission for the construction of such reefs, and the impending removal of its existing artificial reef at the direction of the Commission, threatened its very existence." Thus, it "raised every conceivable theory, including the separation of powers argument, to prevent this from occurring." Its "action in effect invalidated the Commission's issuance of the cease and desist order against Marine Forests on the ground that the Commission, due to the statutory method for the appointment of its voting members, lacked the authority to issue such an order. Although the trial court's decision resolved a constitutional issue involving the separation of powers doctrine, the public's interest in this outcome was incidental to Marine Forests's primary objective of preventing the Commission from ordering it to remove its artificial reef or to pay monetary penalties for its failure to do so. 'Section 1021.5 is intended as a "bounty" for pursuing public interest litigation, not a reward for litigants motivated by their own interests

who coincidentally serve the public.' [Citations.]" The record showed that "although Marine Forests also litigated the separation of powers issue, an award of public interest attorney fees was not necessary to encourage Marine Forests to do so. Rather, it litigated the issue for its own pecuniary benefit, with incidental benefit to the public. In other words, Marine Forests's individual stake in the litigation 'would have been sufficient in its own right to have motivated [its] participation in the litigation.' [Citation.]" "As the party moving for attorney fees under section 1021.5, Marine Forests had the burden to prove that it met the relevant criteria for an award of such fees. [Citations.] However, even after the Commission raised the issue in the trial court, Marine Forests failed to address the manner in which the financial burden of pursuing the litigation outweighed its personal stake in maintaining its artificial reef and avoiding penalties." Therefore, attorney fees were unwarranted because Marine Forests did not meet its burden of establishing the necessary criteria. (*Marine Forests II, supra,* C040739.)

The California Supreme Court then granted the Commission's petition for review in *Marine Forests I* concerning the separation of powers issue. (*Marine Forests Society v. California Coastal Com., supra,* 36 Cal.4th 1, 30 Cal.Rptr.3d 30, 113 P.3d 1062 (hereafter *Marine Forests III*).) And in response to *Marine Forests I,* the Legislature amended Public Resources Code section 30312 (hereafter section 30312) to eliminate the provision concerning the ability of the

Speaker of the Assembly and the Senate Committee on Rules to remove their appointees to the Commission at will. Now such appointments are for a set four-year term.[1]

In *Marine Forests III,* the Supreme Court held injunctive relief was not warranted because the current statutory provisions governing the composition of the Commission do not violate the separation of powers clause of the California Constitution. (*Marine Forests III, supra,* 36 Cal.4th at pp. 14, 52, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) The court then concluded that even if the statutory scheme had violated the separation of powers clause, the Commission's actions prior to the statutory amendment were valid because of the de facto officer doctrine. (*Id.* at p. 53-54, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) Where officers act under color of appointment as provided by an unconstitutional public law, but act before the law is adjudged unconstitutional, their actions are deemed valid even if a challenge to their actions is timely raised in an administrative or judicial proceeding

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[1] Section 30312, subdivision (b)(2) provides: "(2) A member appointed by the Senate Committee on Rules or the Speaker of the Assembly shall serve for four years, and may be reappointed for succeeding four-year periods, provided that the member may continue to serve beyond the four-year term until his or her appointing authority has acted and the appointee is authorized to sit and serve on the commission. If the Senate Committee on Rules or the Speaker of the Assembly has not acted within 60 days after the expiration of a member's term, the position shall become vacant until a person is appointed to a four-year term, calculated from the expiration date of the preceding term."

contesting the validity of an official action. (*Id.* at pp. 54-55, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) A "principal purpose of the de facto officer doctrine . . . is to prevent the crippling of an officer's or commission's operations that would occur if this type of claim . . . could be raised in any proceeding challenging an individual action taken by the officer or commission." (*Marine Forests III, supra,* 36 Cal.4th at p. 56, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) Hence, "the circumstance that the statutory provisions governing the appointment and tenure of the members of the Commission who acted upon a particular matter might be vulnerable to constitutional challenge provides no independent basis for overturning the action taken by the Commission." (*Marine Forests III, supra,* 36 Cal.4th at p. 57, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) Accordingly, the Supreme Court reversed our decision affirming the trial court's judgment granting injunctive relief. (*Id.* at p. 58, 30 Cal.Rptr.3d 30, 113 P.3d 1062.)

After the remittitur was filed in the trial court, Marine Forests renewed in the trial court its motion for attorney fees, asserting that even though it did not obtain a favorable judgment, it is entitled to attorney fees under a catalyst theory of recovery because its action triggered a legislative change in the manner of appointment of Commission members, thereby bestowing a significant benefit upon the public. To fill the evidentiary void left in the earlier proceedings as to whether the financial burden of bringing the litigation was out of proportion to its

individual stake in the matter, Marine Forests provided estimates indicating that it would cost $8,000 to have volunteers remove the artificial reef over a period of approximately six months, or cost $26,300[ ] to have a contractor remove the reef over four days, whereas Marine Forests had incurred $500,000 in attorney fees in pursuing the litigation. This, Marine Forests argued, demonstrated that the financial burden of private enforcement outweighed its personal gain.

The Commission opposed the attorney fee motion, contending that the doctrine of law of the case precluded an award and asserting that Marine Forests was not entitled to fees because it was not the successful party and had not achieved its litigation objectives.

Ruling the doctrine of law of the case barred only an award of trial attorney fees, not appellate attorney fees, the trial court found the lawsuit triggered, and was a catalyst for, the amendment of a statute that violated the California Constitution, which showed Marine Forests had achieved a significant goal of its litigation even if it did not obtain a favorable judgment. The court further found that the resulting legislative amendment also satisfied the first and second requirement of section 1021.5, the vindication of an important right affecting the public interest, which conferred a significant benefit on the general public. In addition, the court found that the financial burden of litigation was out of proportion to Marine Forests's individual stake in the matter because the

cost of removing the reef was outweighed by the cost of litigation. Applying a multiplier of 1.5, the court awarded Marine Forests attorney fees of $176,811.75.

DISCUSSION

The Commission argues the doctrine of law of the case precludes an award of appellate attorney fees. Marine Forests counters that not only are appellate attorney fees appropriate, the trial court erred in ruling that trial attorney fees are barred by law of the case.

We need not address these contentions because regardless of whether the doctrine of law of the case applies, the Commission's alternate appellate contention has merit and bars an award of fees. The Commission correctly asserts that an attorney fee award is not warranted because Marine Forests is no longer the prevailing party and it failed to establish it is entitled to fees under the catalyst theory.

I

Section 1021.5 provides "a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of

private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. . . ."

"Whether a party has met the requirements for an award of fees and the reasonable amount of such an award are questions best decided by the trial court in the first instance. [Citations.] That court, utilizing its traditional equitable discretion, must realistically assess the litigation and determine from a practical perspective whether the statutory criteria have been met. [Citation.] Its decision will be reversed only if there has been a prejudicial abuse of discretion. [Citation.] To make such a determination we must review the entire record, paying particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision. [Citation.]" (*Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075, 1081-1082, 241 Cal.Rptr. 239; accord, *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 544, 63 Cal.Rptr.2d 118.) "The pertinent question is whether the grounds given by the court for its denial of an award are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of th[e] case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute." (*City of*

Sacramento v. Drew (1989) 207 Cal.App.3d 1287, 1298, 255 Cal.Rptr. 704.)

A party seeking an award of section 1021.5 attorney fees must "prevail" or be "successful," which generally involves obtaining a favorable judicial decision, i.e., a judicially sanctioned or recognized change in the legal relationship of the parties. (*Godinez v. Schwarzenegger* (2005) 132 Cal.App.4th 73, 90, 33 Cal.Rptr.3d 270; cf. *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 663, 46 Cal.Rptr.3d 206.) Fees are not barred if the case was won on a preliminary issue or if the parties settled before trial. (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685, 186 Cal.Rptr. 589, 652 P.2d 437.) However, procedural success during the course of the litigation is insufficient to justify such attorney fees where the ruling is later vacated or reversed on the merits. (*Miller v. California Com. on Status of Women* (1985) 176 Cal.App.3d 454, 458, 222 Cal.Rptr. 225.)

II

Marine Forests did not ultimately achieve judicially sanctioned relief because the California Supreme Court reversed our decision that affirmed the trial court's judgment in favor of Marine Forests. (*Marine Forests III, supra,* 36 Cal.4th at p. 58, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) However, a party who does not obtain any judicial relief may be entitled to section 1021.5 attorney fees under what is known as

the "catalyst theory," which permits an award of attorney fees "even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." (*Graham, supra,* 34 Cal.4th at pp. 560-561, 21 Cal.Rptr.3d 331, 101 P.3d 140; *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 178, 31 Cal.Rptr.3d 447.)[2] This saves judicial resources by encouraging the plaintiff to discontinue its litigation after the defendant acquiesces to the remedy initially sought. (*Graham, supra,* at p. 573, 21 Cal.Rptr.3d 331, 101 P.3d 140.)

"In order to obtain attorney fees without such a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, as elaborated in *Graham;* and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Tipton-Whittingham v.*

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[2] Although the United States Supreme Court has rejected the catalyst theory (*Buckhannon Home v. West Va. Dep't* (2001) 532 U.S. 598, 605, 121 S.Ct. 1835, 1840-1841, [149 L.Ed.2d 855, 863]), the California Supreme Court reaffirmed the viability of the theory under state law. (*Graham v. DaimlerChrysler Corp., supra,* 34 Cal.4th at pp. 568-570, 21 Cal.Rptr.3d 331, 101 P.3d 140.)

City of Los Angeles (2004) 34 Cal.4th 604, 608, 21 Cal.Rptr.3d 371, 101 P.3d 174.)[3]

The trial court did not apply this standard in assessing the effect of the amendment of section 30312 in relationship to Marine Forests' entitlement to attorney fees under the catalyst theory. The court found that "[a] significant goal of the litigation was to ensure that the composition of the Coastal Commission complied with the separation of powers doctrine." In cases where judicial relief was obtained, it is sufficient if the plaintiff achieved partial success or succeeded on *any* significant issue in the litigation which achieved *some* of the benefit the plaintiff sought in bringing suit. (*Bowman v. City of Berkeley, supra,* 131 Cal.App.4th at pp. 177-178, 31 Cal.Rptr.3d 447.) However, in catalyst cases, the defendant must have provided the plaintiff with the *primary* relief sought. (*Id.* at p. 178, 31 Cal.Rptr.3d 447.)

III

The allegations of Marine Forests's complaint disclose that its primary goal was to save its reef, not to have section 30312 declared unconstitutional or to change the composition of the Coastal Commission. Thus, the complaint alleged "the actions of [the Commission] in purporting to commence a cease and

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[3] The Commission's briefs do not assert that Marine Forests failed to make reasonable efforts to settle the matter prior to filing the lawsuit.

desist order proceeding violates the Separation of Powers provision of the California Constitution . . . and is void." Asserting that due to conflicts of interest, the Commission had deprived it of due process at the cease and desist hearing on the reef, Marine Forests asked for a de novo hearing by the courts. And the complaint alleged (1) the Commission had violated CEQA by ordering removal of the reef without assessing environmental impacts, (2) removing the reef would make the property useless, which was the equivalent of inverse condemnation, and (3) the Commission violated Marine Forests's civil rights by refusing to approve its application for a permit and pursuing cease and desist proceedings. Hence, the complaint sought to enjoin the Commission from exercising jurisdiction over Marine Forests; from granting, denying or issuing permits; and from issuing and hearing cease and desist orders.

Thus, Marine Forests sought to retain the reef by precluding the Commission from enforcing the cease and desist order for its removal. Marine Forests "raised every conceivable theory, including the separation of powers argument, to prevent this from occurring." (*Marine Forests II, supra,* C040739.) In other words, its primary objective was to preserve the artificial reef.

Marine Forests did not achieve its objective. The Commission continues to issue cease and desist orders, and its pre-amendment orders, including the order for Marine Forests to either remove its reef or face substantial penalties, have not been invalidated.

The Commission did not "change[] its behavior substantially because of, and in the manner sought by, the litigation." (*Graham, supra,* 34 Cal.4th at p. 560, 21 Cal.Rptr.3d 331, 101 P.3d 140.) It did not provide the primary relief that Marine Forests sought. (*Tipton-Whittingham v. City of Los Angeles, supra,* 34 Cal.4th at p. 608, 21 Cal.Rptr.3d 371, 101 P.3d 174.) Rather, the Legislature responded to our decision in *Marine Forests I* by amending section 30312 to alter the appointment structure for Commission members; but this is not a change in the *defendant Commission's* behavior.

Relying on language in *Bjornestad v. Hulse* (1991) 229 Cal.App.3d 1568, 281 Cal.Rptr. 548 (hereafter *Bjornestad*), Marine Forests claims the legislative change is sufficient to support an award of attorney fees.

In *Bjornestad,* residents of a special water district filed suit seeking a declaration that a special water district election statute was unconstitutional because it specified that only landowners in the district, as opposed to residents, could vote in district elections or be a member of the district's board of directors. This court initially held the landowner-only provisions were unconstitutional. (*Bjornestad, supra,* 229 Cal.App.3d at pp. 1573-1574, 281 Cal.Rptr. 548.) A short time after the opinion was filed, the Legislature amended the Water Code to grant both residents and landowners the right to vote in the elections, and the water district petitioned the California Supreme Court for review of our decision. (*Id.* at pp. 1574-1575,

281 Cal.Rptr. 548.) Review was granted, and the cause was transferred to this court with directions to vacate its opinion and reconsider the matter in light of the statutory amendment. (*Id.* at p. 1575, 281 Cal.Rptr. 548.)

Bjornestad determined that the amendment did not moot the appeal because the pre-amendment landowner-only voting scheme, which placed the current directors in office, could not be used to validate those elections; hence, a new election would have to be held so that the nonlandowner/resident plaintiffs had the opportunity to participate in the process. (*Bjornestad, supra,* 229 Cal.App.3d at pp. 1576, 1578-1586, 281 Cal.Rptr. 548.) However, *Bjornestad* rejected the plaintiffs' contentions that the statutory amendment, which permitted nonresident landowners to vote, unconstitutionally diluted the votes of newly enfranchised residents and violated California's Constitution. (*Id.* at pp. 1586-1598, 281 Cal.Rptr. 548.)

Regarding attorney fees, *Bjornestad* (1) observed that in the pre-amendment litigation, the trial court had awarded fees under section 1021.5, and (2) noted that the Legislature had "obviously recognized the merits of plaintiffs' contention that Sierra residents are entitled to vote in Sierra elections and be members of Sierra's governing body." (*Bjornestad, supra,* 229 Cal.App.3d at p. 1598, 281 Cal.Rptr. 548.) *Bjornestad* observed that "'Case law takes a pragmatic approach in defining "prevailing" or "successful" party within the meaning of [Code of Civil Procedure]

section 1021.5. "The critical fact is the impact of the action," in achieving the desired result, not "the manner of its resolution." [Citations.] The impact might include legislative changes, settlements, or amendments in policy.' [Citation.]" (*Id.* at p. 1598, 281 Cal.Rptr. 548.) Accordingly, it affirmed the trial court's order awarding attorney fees. (*Ibid.*)

Bjornestad is of little assistance to Marine Forests because it was filed prior to the California Supreme Court's refinement of the catalyst theory and, therefore, it did not apply the requisite factors. And in *Bjornestad,* the plaintiffs unquestionably obtained the primary relief sought-the ability to vote in district elections and to become members of the board.

Here, the Legislature's amendment of section 30312 cannot be viewed as the primary relief sought by Marine Forests' complaint, which was aimed at preventing the removal of its artificial reef. Furthermore, the legislative change did not satisfy Marine Forests, who in *Marine Forests III* continued to challenge the amended statute as well as the Commission's actions under the pre-amendment statute. It argued the new statute did not resolve its concerns because the Speaker of the Assembly and the Senate Committee on Rules still selected the majority of the Commission's members. (*Marine Forests III, supra,* 36 Cal.4th at pp. 26, 49, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) It also asserted that actions taken by the Commission prior to the statutory amendment, such as ordering Marine Forests to remove its reef, were invalid. (*Id.* at pp. 53-57 & fn. 26, 30 Cal.Rptr.3d 30,

113 P.3d 1062.) Marine Forests's challenges were not successful. (*Id.* at pp. 52, 57, 30 Cal.Rptr.3d 30, 113 P.3d 1062.) It has not saved its reef, nor has it changed the fact that the Speaker of the Assembly and the Senate Committee on Rules continue to appoint a majority of the Commission's members. The only change is the appointees now serve set four-year terms, rather than two-year terms at the pleasure of their appointing authorities.

In sum, Marine Forests failed to establish that defendant provided the primary relief sought in its litigation. Hence, the trial court erred in awarding attorney fees to Marine Forests under the catalyst theory. Because Marine Forests was not entitled to section 1021.5 attorney fees, its cross appeal fails.

DISPOSITION

The trial court's order awarding section 1021.5 attorney fees to Marine Forests is reversed. The parties shall bear their own costs on appeal. (Cal Rules of Court, rule 8.278(a)(5).)

We concur: DAVIS and ROBIE, JJ.